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No. 92-45

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

HARRY S. STONEHILL, ET UX,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to The United States Court of Appeals For the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

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13 pp

QUESTION PRESENTED

THE RESPONDENT INCORRECTLY ASSERTS THAT THE SOLE QUESTION PRESENTED IN THE INSTANT PETITION IS THE INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 60(B)(5), THUS IGNORING THE DUE PROCESS IMPLICATION OF MULTIPLE SEIZURES OF PROPERTY BY THE INTERNAL REVENUE SERVICE DURING A PERIOD OF 30 YEARS WITHOUT AN ACCOUNTING FOR THE APPLICATION OF THE PROCEEDS.

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REPLY BRIEF OF PETITIONERS

I. SUMMARY

In 1980 a U.S. District Court issued a tax deficiency judgment against Petitioners in the amount of $8,984,668.48. In 1988 the Internal Revenue Service contended that the Petitioners owed $15,050,505.47, with interest as the largest single component of the bill. Counsel for Internal Revenue Service subsequently reduced and then again raised this number at argument. Petitioners have contended for twelve years that the judgment had been satisfied, because the United States had already levied and seized sufficient property and assets to satisfy the tax deficiency. Petitioners repeatedly moved for an accounting by the Internal Revenue Service for the property and assets levied and seized.

In fact, counsel for the United States conceded at oral argument before the Ninth Circuit that the only credits considered by the District Court for the 1980 judgment were limited to those payments reflected on the face of the tax returns for 1958, 1959 and 1960, long before the levies and seizures. The lower Court failed to require the Internal Revenue Service to render an accounting. The Ninth Circuit offered no relief from this abuse of power, relying upon the principle of *res judicata* as a bar to the relief requested.

Petitioners have been denied their Fifth Amendment Due Process rights by the Internal Revenue Service, which seized property directly from Petitioners and property in the hands of third parties, but refused for a period of 30 years to reveal how the property and assets seized were applied to the earlier tax deficiencies. It is noteworthy that 26 U.S.C.A. 6342 (1989) specifies the order in which proceeds from a levy are to be applied to a deficiency. The return of surplus proceeds is also specified by the statute. In the absence of an

accounting, no proof could be advanced to satisfy the provisions of this statute.

The proceedings in this case are inconsistent with prior holdings of this Court and in conflict with the holdings of several of the other Circuits. Such an abuse of power by the United States cries out for a clarification and delineation of the Internal Revenue Service's powers by this Court. This is especially so here, because the instant case presents this Court with a paradigm of government run amok against the intentions and designs of the framers of the Fifth Amendment and, by inference, against the Constitution.

II. RES JUDICATA IS NO BAR TO A MOTION UNDER RULE 60(B)(5) WHEN REPEATED MOTIONS FOR AN ACCOUNTING WERE MADE

Respondent United States has opposed Petitioners only on the ground of *res judicata*, asserting that Petitioners' motions for an accounting are collateral attacks on the 1980 tax deficiency judgment issued by the U.S. District Court and upheld by the Ninth Circuit. Respondent's assertion is simply not true. Petitioners have not questioned the 1980 tax judgment, *but rather they have questioned whether or not the judgment has already been satisfied by assets seized, and for this reason only Petitioners have made their repeated motions in the lower Court for an accounting.*

Petitioners have repeatedly asserted that the judgment amount of $8,984,668.48 with accumulated interest has already been satisfied. Petitioners have no way of knowing whether or not all of the property and assets levied and seized were ever applied to satisfy the judgment or in what sequence the levied assets were applied. Petitioners now know *what* was seized, and *when* it was seized, but *they*

do not know what happened to it since the date of the levy. Petitioners were informed that their business records were destroyed in 1970 by a typhoon after having been seized in the Philippines in the early 1960's. Consequently, Petitioners are left to wonder what happened to their property 30 years after levy and seizure when the Internal Revenue Service refuses to account for the property and the Federal Courts have thus far refused to require that Internal Revenue Service so account.

III. REPLY TO ERRORS IN THE STATEMENT OF THE UNITED STATES IN OPPOSITION

The United States unfairly characterize Petitioners (at page 2, par. 1 of Opposition) by stating that Petitioners received millions of dollars "from illegal and unrecorded sources." No further evidence of the pertinence of that statement was offered. The record shows that this case can be traced to a political vendetta instigated by individuals in the U.S. State Department against Petitioner Harry S. Stonehill and his business partner Robert P. Brooks. The State Department officers believed that the two men had become too influential in the Philippine Islands.

The two men's business records were seized in violation of the Philippine Constitution (as so found in 1967 by the Philippine Supreme Court) and subsequently many of the records were destroyed in a typhoon after the United States had extracted those records which it wished to have and introduce into evidence. The lower Courts accepted the portions of the seized evidence, although after the typhoon Petitioners had no chance to obtain documents which might have exculpated them. The U.S. Federal Courts accepted

illegally seized evidence despite an obvious violation of the principle of comity in international law.

The United States admits (at page 2, par. 1 of its Opposition) that levies were made worldwide prior to the 1980 U.S. District Court judgment and the 1984 Tax Court judgment. Petitioners before and after 1980 repeatedly moved for an accounting because there was no other way for them to determine whether or not the Internal Revenue Service applied the proceeds from the sale of property and assets to the tax deficiencies and in what order. Contrary to Respondent's assertion, Petitioners have not tried to relitigate the tax computation, but they do have a right to know exactly how much is due after credits for property levied and seized.

The United States (at page 3, par. 3 in Opposition) states that Petitioners are attempting to challenge the accuracy of the 1980 tax deficiency judgment issued by the U.S. District Court. This is simply false. *Petitioners are attempting to establish whether or not the judgment has already been satisfied by the levy and seizure of their property and assets all over the world.* The Internal Revenue Service has not performed even a minimal accounting of the assets levied and seized and has persistently resisted Petitioners' motions for an accounting.

Absent an accounting there is no other way for Petitioners to know what happened to valuable property and assets acknowledged to have been seized, but which were never applied to the taxes. Petitioners respectfully submit to this Court that the equities of this case demand an accounting by the Internal Revenue Service.

IV. DISCUSSION

The United States failed to respond to the Due Process arguments of the Petition particularly as to the precedents cited: *United States v. Salerno,* 481 U.S. 739 (1987); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Little v. Streater,* 452 U.S. 1 (1981); and *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990). Respondent relies entirely on a formalistic interpretation of *res judicata* and *collateral estoppel* principles. Petitioners assert that the Ninth Circuit itself erred in interpreting the precedents relied upon by the United States in its Opposition.

At page 4, of the Opposition, the United States identifies what the critical issue really is in *its* opinion *i.e.,* whether the contentions *could have been raised* before judgment. Because the motions for accounting in the record have been unanswered and ignored, it would have been impossible for the large number of seizures worldwide to *have been considered* by the parties and the Court prior to the 1980 judgment.

The United States at page 5 of the Opposition misinterpreted *Sunderland v. City of Philadelphia,* 575 F.2d 1089 (3rd Cir. 1978); *Kassman v. American University,* 546 F.2d 1029 (D.C. Cir. 1976); and *Snowden v. D.C. Transit System, Inc.,* 454 F.2d 1047 (D.C. Cir. 1971). The United States interpreted the cases to mean that relief under Federal Rule of Civil Procedure 60(b)(5) can occur only where payments were made *after* entry of judgment. On the contrary, in all three cases cited, the payments and credits occurred *before* entry of judgment.

The Ninth Circuit introduced the novel theory that payments must come from third parties or independent

sources in order to be considered in *res judicata* or *collateral estoppel* controversies. This theory is unsupported by the case law before this Court or other Circuits. The United States has embraced these theories which are at odds with other Circuits and are, moreover, illogical.

Interest on Fraud Penalties

The Ninth Circuit's misinterpretation of *Decker v. United States,* 531 F.2d 543 (Ct. Cl. 1976) offers an especially pertinent example of how the Ninth Circuit has misapplied case law. Despite the fact that the Tax Court did not make a finding of tax fraud until 1984, the Internal Revenue Service computed interest on the fraud penalty from the outset of these proceedings in the 1960's. The Ninth Circuit is, then, at odds with *Decker*, which supports the proposition that interest on the fraud penalty (in this case as much as $2,500,000) could be charged only after the judgment of the Tax Court in 1984. The United States asserts in its Opposition that for all intents and purposes a judgment contrary to law, *e.g.* interest on fraud penalties, cannot be overturned. Petitioners respectfully submit that such a position is unconscionable when the same Court has refused to require an accounting by the Internal Revenue Service.

Petitioners Cannot Now Know What Their Liability Is

Petitioners are now faced with a statement of liability (Schedule of Tax Liability, February 3, 1988) containing obvious errors amounting to millions of dollars. They cannot be certain of their taxes owed at this time because the lower Courts have refused to require an accounting.

V. CONCLUSION

Petitioners urge and pray that this Court grant review of the questions presented in the instant Petition for the reasons set forth in the Petition and in this Reply, because the positions at issue herein are of vital importance both as a matter of law and this Court's supervisory role in our Constitutional system.

Respectfully submitted,

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